**MV 97-10**
**TAX TYPE: MOTOR VEHICLE USE TAX**
**Issue: Rolling Stock (Vehicle Used Interstate For Hire)**

**STATE OF ILLINOIS**
**DEPARTMENT OF REVENUE**
**OFFICE OF ADMINISTRATIVE HEARINGS**
**CHICAGO, ILLINOIS**

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| THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS | ) | |
| | ) | Docket No. |
| | ) | IBT No. |
| v. | ) | NTL |
| | ) | |
| TAXPAYER A | ) | Administrative Law Judge |
| Taxpayer | ) | Mary Gilhooly Japlon |

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## RECOMMENDATION FOR DISPOSITION

**Appearances:** Special Assistant Attorney General Richard A. Rohner, on behalf of the Department of Revenue of the State of Illinois; Collins & Collins, by Michael R. Collins, on behalf of TAXPAYER A and TAXPAYER B.

**SYNOPSIS:**

This matter comes on for hearing pursuant to the timely protest by Frontier Coach, Inc. (hereinafter "TAXPAYER A") of Notice of Tax Liability ("NTL") No. XXXXX issued by the Department of Revenue (hereinafter "Department") on December 14, 1993 in the amount of $30,534 for Use Tax, penalty and interest due on the purchase of eight

buses in March and May 1993. The taxpayer, TAXPAYER A, timely protested this assessment. TAXPAYER B made a timely protest to NTL No. XXXXX, issued by the Department on July 20, 1995 for the period of July 1993 in the total amount of $24,199.00 for the purchase of five buses. TAXPAYER A and TAXPAYER B have been consolidated for the purpose of hearing. A hearing was held whereat Mr. WITNESS testified on behalf of the taxpayer; Revenue Auditor Jonette Bartulis testified on behalf of the taxpayer as an adverse witness. Specifically at issue is whether the taxpayer is entitled to the "rolling stock" exemption of the Use Tax Act on its bus purchases. The parties filed a Stipulations of Fact (Joint Ex. No. 1) in regard to TAXPAYER A, only. Subsequent to the hearing, they filed memoranda of law in support of their respective positions.

Following the submission of all evidence and a review of the record and briefs filed herein, it is recommended that this matter be resolved in favor of the Department of Revenue.

**FINDINGS OF FACT:**

1. The parties entered into a Stipulations of Fact (Joint Ex. 1) which pertains solely to TAXPAYER A (94 ST 0047). (Tr. 8).

2. The Department's *prima facie* case, inclusive of all jurisdictional elements, was established by the admission into evidence of the Corrections of Returns, showing a total liability due and owing in the amount of $28,127.00 for state Use Tax and penalty for the period of September 1990 through July 1993 (TAXPAYER A), and $20,680.00 for the period of July 1993 (TAXPAYER B). (Dept. Ex. Nos. 1 and 2; Tr. pp. 6-7).

3. TAXPAYER A is an Illinois corporation. (Joint Ex. 1, par. 1).

4. TAXPAYER A received a grant of authority from the Interstate Commerce Commission on July 18, 1985 to operate as an interstate carrier of passengers for hire. (Joint Ex. No. 1, par. 2, Ex. A; Tr. pp. 10, 20).

5. TAXPAYER A is in the business of transporting passengers via bus for schools and private organizations. (Joint Ex. 1, par. 3).

6. On December 14, 1993 the Illinois Department of Revenue issued Notice of Tax Liability XXXXX to TAXPAYER A. (Joint Ex. 1, par. 4, Ex. B).

7. On February 7, 1994 TAXPAYER A timely filed its protest of the assessment. (Joint Ex. 1, par. 5).

8. The tax assessed against TAXPAYER A arises from the taxpayer's purchase of eight (8) buses in March and May 1993. (Joint Ex. 1, par. 6, Ex. C).

9. TAXPAYER A produced to the Department trip tickets reflecting certain trips for the eight buses from May 1993 through approximately November 1994. (Joint Ex. 1, par. 8, Ex. D).

9 Each bus of TAXPAYER A is used on trips across state lines or with passengers in route across state lines between 5 percent to 10 percent of its use each year. (Joint Ex. 1, par. 9).

10. No evidence was proffered regarding the type or quantity of any trips engaged in by TAXPAYER B.

**CONCLUSIONS OF LAW:**

The Department prepared corrected returns for Use Tax Liability pursuant to section 4 of the Retailers' Occupation Tax (hereinafter

ROT) Act (35 **ILCS** 120/4). Said section is incorporated in the Use Tax Act via section 12 thereof (35 **ILCS** 105/12). Section 4 of the ROT Act provides in pertinent part as follows:

> As soon as practicable after any return is filed, the Department shall examine such return and shall, if necessary, correct such return according to its best judgment and information, which return so corrected by the Department shall be prima facie correct and shall be prima facie evidence of the correctness of the amount of tax due, as shown therein.
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> Proof of such correction by the Department may be made at any hearing before the Department or in any legal proceeding by a reproduced copy ... in the name of the Department under the certificate of the Director of Revenue. ... Such certified reproduced copy ... shall without further proof, be admitted into evidence before the Department or in any legal proceeding and shall be prima facie proof of the correctness of the amount of tax due, as shown therein. (35 **ILCS** 120/4).

In the case at bar, the taxpayer is challenging the assessment by the Department of Use Tax, penalty and interest on the purchase of eight buses by TAXPAYER A, and the purchase of five buses by TAXPAYER B. The taxpayer asserts that the purchases are exempt from Use Tax based upon the "rolling stock exemption" as set forth in sections 3-55 and 3-60 of the Use Tax Act as follows:

> Sec. 3-55. Multistate exemption. To prevent actual or likely multistate taxation, the tax imposed by this Act does not apply to the use of tangible personal property in this state under the following circumstances:
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> ***

> (b) The use, in this State, of tangible personal property by an interstate carrier for hire as rolling stock moving in interstate commerce... . (35 **ILCS** 105/3-55).
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> Sec. 3-60. Rolling stock exemption. The rolling stock exemption applies to rolling stock used by an interstate carrier for hire, even just between points in Illinois, if the rolling stock transports, for hire, persons whose journeys or property whose shipments originate or terminate outside Illinois. (35 **ILCS** 105/3-60).

To be considered an interstate carrier for hire, the taxpayer must either possess an Interstate Commerce Commission Certificate of Authority, an Illinois Commerce Commission Certificate of Authority, or be a carrier recognized by the Illinois Commerce Commission. (*See,* 86 Ill. Admin. Code ch. I, Sec. 130.340). In the instant case, the parties stipulated that TAXPAYER A received a Certificate of Authority issued by the Interstate Commerce Commission on July 18, 1985 to operate as an interstate carrier of passengers for hire. (Joint Ex. 1, par. 2, Ex. A).

Regarding the requirement that the "interstate carriers" must be "for-hire", the administrative rules provide that "[t]he term 'rolling stock' includes the transportation vehicles of any kind of interstate transportation company for hire (... bus line, ...)", but the exemption does not contemplate vehicles:

> used by a person to transport its officers, employees, customers or others not for hire (even if they cross State lines) or to transport property which such person owns or is selling and delivering to customers (even if such transportation crosses State lines). 86 Ill. Admin. Code ch. I, Sec. 130.340(b).

In sum, the taxpayer must prove by documentary evidence that it is an interstate carrier for hire using rolling stock that transports

persons or property moving in interstate commerce. TAXPAYER A has met the threshold requirement that it is an interstate carrier for hire.[1] It must now prove that the vehicles at issue are used as rolling stock moving in interstate commerce. That is, the taxpayer must show with competent evidence that its rolling stock (i.e., vehicles) transports, for hire, "persons whose journeys or property whose shipments originate or terminate outside Illinois", and therefore, qualifies for the rolling stock exemption.[2]

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[1]. In paragraph 9 of the stipulation, the parties state in regard to TAXPAYER A that "[e]ach bus is used *on trips across state lines* or with passengers in route across state lines between 5% to 10% of its use each year." (Emphasis supplied). It is to be noted that the emphasized language could be interpreted as meaning that the buses crossed state lines without carrying any passengers or property. If this were the case, the buses would not be "for hire" and therefore, would not even meet the threshold requirement of being an "interstate carrier for hire". As the trip tickets in evidence indicate that the charter trips carried passengers across the state line and dropped them off to be returned to Illinois either on the same day or a few days later, it can be assumed that that was what the stipulation was meant to purport.

[2]. It is to be noted that the only evidence proffered on behalf of TAXPAYER B pertains to the Certificate of Authority granted to Frontier Coach, Inc. on July 18, 1985 to operate as an interstate carrier of passengers for hire. Even though the testimony of taxpayer's witness WITNESS regarding the operations of the taxpayer was meant to apply to both TAXPAYER A and TAXPAYER B, nothing relevant to the liability period was presented. Certainly, no documentary evidence at all was even offered pertaining to the amount of or nature of any trips taken by TAXPAYER B. It is well settled case law that in order to overcome the presumption of validity attached to the Department's corrected returns, the taxpayer must produce competent evidence identified with their books and records showing that the Department's returns are not correct. (Copilevitz v. Department of Revenue, 41 Ill.2d 154 (1968), Masini v. Department of Revenue, 60 Ill.App.3d 11 (1st Dist. 1978)). Oral testimony offered by the taxpayer without corroborating documentary evidence is insufficient to rebut the Department's prima facie case of tax liability. (A.R. Barnes and Co. v. Department of Revenue, 173 Ill.App.3d 826 (1st Dist. 1988)).Said taxpayer has, therefore, failed to rebut the Department's *prima facie* case, consisting of the corrected return, submitted into

Several questions arise, such as (1) what types of trips constitute interstate commerce and qualify for the rolling stock exemption; and (2) how much interstate movement is necessary for an otherwise qualifying taxpayer to be entitled to the exemption. The regulations pertaining to the statutes at issue do not directly address these questions, but do shed some light on the issues. 86 Ill. Admin. Code ch. I, Sec. 130.340 provides in relevant part as follows:

> (c) The rolling stock exemption cannot be claimed by a purely intrastate carrier for hire as to any tangible personal property which it purchases because it does not meet the statutory tests of being an interstate carrier for hire.
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> (d) The exemption applies to vehicles used by an interstate carrier for hire, even just between points in Illinois, in transporting, for hire, persons whose journeys or property whose shipments, originate or terminate outside Illinois on other carriers. The exemption cannot be claimed for an interstate carrier's use of vehicles solely between points in Illinois where the journeys of the passengers or the shipments of property neither originate nor terminate outside Illinois.

The Notice of Tax Liability issued to TAXPAYER A indicates thereon that the audit period is September 1990 through July 1993. (Joint Ex. 1, par. 4, Ex. B). Paragraph six to the stipulation (Joint Ex. 1) provides that the eight buses at issue were purchased by the taxpayer in March 1993 and May 1993. This information is of considerable consequence because the trip tickets reviewed by the Department and which form the criterion of the taxpayer's assertion

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evidence under the certificate of the Director of Revenue. The remainder of the discussion, therefore, pertains to TAXPAYER A.

that its rolling stock moved in interstate commerce covered the period of May 1993 through November 1994 (Joint Ex. 1, par. 8, Ex. D). In the case of Chicago and Illinois Midland Railway Company v. Department of Revenue, 66 Ill.App.3d 397 (1st Dist. 1978), the Court held that in order for the rolling stock exemption to apply, the interstate use of the rolling stock must have occurred during the audit period. Applying that holding to the instant case would result in an analysis of the trip tickets from May 1993 through July 1993, only. It is obvious, therefore, from the following delineation of trips taken by each bus, that the evidence indicates that only one trip out of all the trips reflected by the trips tickets was within the audit period. That trip, taken by bus no. 213, left Illinois on June 13, 1993 and returned from a neighboring state on June 16, 1993. No evidence was proffered as to four of the eight buses at issue, and the trips taken by the remaining four buses were negligible in amount and dehors the audit period. Therefore, that evidence cannot be considered.[3]

However, in an attempt to analyze all aspects of this case, it will be assumed that all the trip tickets proffered can be reviewed. Even accepting this proposition, though, there are other profound problems with the taxpayer's case. Section 3-60 of the Use Tax Act exempts "rolling stock used by an interstate carrier for hire, even

[3]. The holding in Chicago and Illinois Midland Railway Company v. Department of Revenue, *id.*, is pertinent to this matter in that the exemption is claimed by the taxpayer at the time of purchase. There is no indication in the record that all of its buses are used as rolling stock, or how the determination is made by the taxpayer to claim the exemption on its bus purchases. It is of serious concern if the taxpayer claims the exemption at the time of purchase, but only uses the bus, by happenstance, for an exempt purpose six months, eight months or one year later.

just between points in Illinois, if the rolling stock transports, for hire, persons whose journeys or property whose shipments originate or terminate outside Illinois." This language could apply to taxpayer's transport of passengers to and from airports, as it can be reasonably assumed that those passengers would board planes leaving the state, or have arrived from out-of-state. However, while taxpayer's transport of passengers to neighboring states for brief durations (i.e., returning the same passengers via the same bus and same driver on the same day or shortly thereafter) constitutes interstate travel as the Illinois state line is crossed, these types of trips do not qualify for the rolling stock exemption as they are one continuous trip, both originating and terminating in Illinois. The round-trip nature of the charter excursions is manifested by the trip-tickets or invoices in evidence. For each of those out-of-state charter trips, there is one invoice reflecting that the bus is to leave Illinois at a time certain, and return to Illinois with the same driver and passengers all within a short time frame.

For example, in 1993 the evidence proffered in exhibit D to Joint Ex. 1 reveals that bus no. 213 made two trips to neighboring states, one returning after two days, and the other after three days. There is no other evidence regarding any other trips taken by any of the other buses in 1993.

In 1994, bus no. 213 made one trip; it arrived at its out-of-state destination and returned two days later. Bus no. 310 took three interstate trips, one of which returned the same passengers the same day. In the two other trips, the bus returned the passengers three days after their arrival in one instance, and two days afterwards in

the other. Bus no. 301 made one trip that returned with the same passengers on the same day, one trip wherein the passengers were returned two days later and another trip wherein the passengers returned to Illinois three days later. Bus no. 300 made four same day trips.

It is noteworthy that even though paragraph 8 stipulation (Joint Ex. 1) speaks of trip tickets produced by the taxpayer reflecting "certain trips for the eight buses from May 1993 through approximately November 1994", trip tickets for certain trips taken in 1995 by several of the buses were included in the exhibit. As the stipulation refers only to the period through November 1994, I will not address the trip tickets beyond that date.

Assuming arguendo that some trips originate or terminate outside of Illinois, the taxpayer failed to surmount an evidentiary hurdle necessary to sustain its burden herein. During the course of the audit, the taxpayer did not tender any of the trip tickets to the Revenue Auditor for review. However, at some latter point, the taxpayer produced the trip tickets for the Department's inspection. The trip tickets pertain to "certain trips for the eight buses from May 1993 through approximately November 1994". (Joint Ex. 1, par. 8). The parties stipulated in paragraph 9 of Joint Ex. 1 that "[e]ach bus is used on trips across state lines or with passengers in route across state lines between 5% to 10% of its use each year". Exhibit D to the Joint Exhibit consists of copies of the trip tickets.

Regardless, nowhere in the record is it delineated which bus or buses took interstate trips that constituted five, six, seven, eight, nine or ten percent of its annual trips. There is no evidence as to

the total number of trips each bus took each year, nor is there any evidence distinguishing the types of trips taken by each bus (i.e., trips across state lines, as opposed to trips with passengers in route across state lines).

This information is of probative value because the rolling stock exemption specifically only exempts rolling stock used to transport persons or property whose journeys or shipments originate or terminate outside of Illinois. There is a distinction between trips to airports to transport passengers in route across state lines, as opposed to charter trips to neighboring states wherein the trip arguably originates and terminates in Illinois. There is no law in Illinois, whether it be case, statutory or regulatory, that sets forth a threshold number of qualifying trips which must be met before the rolling stock exemption can be invoked. However, without this specific evidentiary segregation set forth in the record, there would be no way to confer exempt status on any bus, even if the facts revealed a diminimous number of trips to airports with passengers intending to leave this State.

The intent behind the rolling stock exemption is the avoidance of multistate taxation. The case of Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) allows a state to impose a tax on interstate commerce under certain qualifying conditions. In enacting section 3-55 of the Use Tax Act (35 **ILCS** 105/3-55), the Illinois legislature was reiterating that in order to prevent actual or likely multistate taxation, certain situations are exempted from the application of tax.

There is no suggestion that any other state was in a position to impose its own Use Tax on the rolling stock, nor is there any likelihood of multistate taxation due to the very limited utilization of the buses in other states, both as to frequency and length of duration while in another state. Given the facts of the case, it is highly improbable that another state could constitutionally impose a tax on the buses. Due to the lack of any "substantial nexus" between the activity to be taxed and another state, any attempt by another state to tax might well trigger Commerce Clause concerns. (*See,* Complete Auto Transit, Inc. v. Brady, *id.*).

The taxpayer cites the case of Burlington Northern, Inc. v. Department of Revenue, 32 Ill.App.3d 166 (1st Dist. 1975), in support of its position that the rolling stock exemption is to be liberally construed in order to avoid placing any possible burden on interstate commerce. In Burlington Northern, the court was concerned with whether the imposition of state Use Tax upon the purchase of various transportation vehicles would unduly burden interstate commerce. The court could not find any legislative history or intent regarding the enactment of the rolling stock exemption, and therefore, utilized general principles of statutory construction in rejecting the "original intent and primary purpose" standard employed by the Department in determining whether the rolling stock exemption was applicable to the vehicles at issue. The court found that the application of this standard may make it administratively easier for the Department to decide whether the exemption applies, but it has no basis in statute or regulation, nor was it apparently within the contemplation of the legislature. The court therefore found that

Burlington Northern's physical movement across state lines 13 percent of the time, combined with the interstate movement accorded to said taxpayer as a carrier of interstate traffic, was sufficient to allow various transportation vehicles to qualify for the "rolling stock" exemption.[4]

The Burlington court seems to ignore the preamble to the exemptions set forth in section 3-55 of the Act, which provides that "[t]o prevent actual or likely multistate taxation, the tax imposed by this Act does not apply to the use of tangible personal property in this state under the following circumstances... ." This appears to stem from the court's determination that the Illinois legislature intended to exempt rolling stock moving interstate commerce regardless of the potentiality of multiple taxation. Because the intent of the legislature is so clearly provided in the statute, I respectfully disagree with the Burlington Court's determination that the preamble is meaningless and, therefore, merely superfluous.

The Burlington case is factually distinguishable from the instant case. The court in Burlington determined that the purchases of

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[4]. The taxpayer also cites the case of Time, Inc. v. Department of Revenue, 11 Ill.App.3d 282 (1st Dist. 1973), in validation of its position. In Time, Inc. the court concurred with the position of Time that a taxpayer need not prove that multistate taxation will occur if it is not granted an exemption set forth in section 3-55 of the Use Tax Act (formerly section 439.3). Rather, the court determined that the sole requisite is for the taxpayer to prove that it satisfies the criterion as set forth in the statute, and therefore, qualifies for the exemption.

I find Time, Inc. to recite nothing more than what is already settled case law in Illinois. It is a basic tenet that the taxpayer carries the burden of proof when claiming an entitlement to exemption. (MacMurray College v. Wright, 38 Ill.2d 272 (1967)). Time, Inc. simply clarifies that the prefatory phrase, "[t]o prevent actual or likely multistate taxation ..." is a comment on the intent behind granting the exemption.

various types of equipment by the railroad company were excepted from Use Tax pursuant to the rolling stock exemption due to the intertwining of taxpayer's intrastate and interstate business. In finding passenger cars exempt, the court held that when considering Burlington's 13 percent of actual physical movement across state lines, combined with the interstate movement "conferred on" the railroad by reason of its transportation of interstate traffic consisting of mail and express packages, it can be concluded that Burlington's "interstate use and involvement is ... intertwined with its intrastate use... ." (32 Ill.App.3d 166, 176). The same reasoning was applied when finding switching engines to be exempt. That is, the railroad company's interstate use and involvement of the equipment was so intertwined with its intrastate use that to discontinue its intrastate business would in great measure negatively affect its interstate business.

The business of Burlington Northern consists in great measure of the interstate movement of people and goods. On the other hand, judging from the inconsiderable amount of use allocated to trips across state lines, the nature of Frontier's business is the transportation of children for schools. The parties stipulated that each bus is used on trips across state lines or with passengers in route across state lines between 5 to 10 percent of its use each year. The ten percent figure approaches Burlington Northern's 13 percent figure. Five percent, however, is significantly less.

In First National Leasing & Financial Corporation, *supra,* the court denied the taxpayer the rolling stock exemption due to the fact that it lacked documentary evidence to indicate the amount of eligibly

exempt interstate commerce in which it engaged. In a concurring opinion, Justice Green opined that the oral evidence elicited at the administrative hearing indicated that the equipment at issue crossed on an "infrequent and irregular basis". There was no bonafide risk of multistate taxation, and therefore, no commerce clause requisite for the apportionment of Use Tax to use in Illinois.

In the case at bar, the evidence that was presented is documentary in nature, or stipulated evidence. However, the body of facts is insufficient to determine the actual percentage of trips taken by each bus across state lines or with passengers in route across state lines, as well as to conclude that the trips taken by each bus were at all conducted on a fixed schedule or with any degree of regularity. In fact, there is no evidence as to four of the eight buses at issue regarding the amount of or nature of any trips. Regarding 1993, the evidence reflects that only one bus, no. 213 made any trips at all, and those consisted of two trips of brief duration. In 1994, bus nos. 310 and 301 each made three trips, one of which was a same day trip. Bus no. 213 made one trip which returned to Illinois after two days, and bus no. 300 made four same day trips.

As noted previously, when granting exemptions from tax, the burden is on the taxpayer to prove clearly and conclusively its entitlement thereto. Statutes which exempt property or entities from taxation must be strictly construed in favor of taxation and against exemption. (Wyndemere Retirement Community v. Department of Revenue, 274 Ill.App.3d 455 (2nd Dist. 1955)). In the case at bar, Frontier Coach, Inc., 2 and TAXPAYER B have failed to carry the burden of proof. It is, therefore, my determination that the taxpayers are not

entitled to the rolling stock exemption, and that Use Tax was properly assessed on the bus purchases.

RECOMMENDATION:

It is my recommendation that NTL Nos. XXXXX and XXXXX be affirmed in their entirety.

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Administrative Law Judge